No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA,
OLD REPUBLIC INSURANCE COMPANY and
JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON
and WESTMORELAND COAL COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF CLAIMANT RESPONDENTS

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STATEMENT OF INTEREST

The United Mine Workers of America represents over 200,000 working, retired and laid-off coal miners throughout the United States and Canada. The UMWA was a primary force in the adoption of the Federal Coal Mine Health and Safety Act, which included the black lung benefits program at issue in this case. The UMWA is filing this amicus brief because of the profound effect the outcome will have on both its own membership and coal

miners in general. The ruling here will directly affect 10,000 black lung claimants and as a practical matter will determine whether many of them will receive benefits. Very frequently black lung benefits make the difference between a recipient living at a bare subsistence level or with some minimal degree of comfort and security.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the second major attempt by coal operators to undermine the clear congressional intent that black lung benefits be liberally awarded based upon a readily invocable presumption. The first such challenge took place in the matter of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case this Court turned back the operator's broadside constitutional attack which argued that the Black Lung Act's definitions, presumptions and limitations on rebuttal evidence unconstitutionally impaired their ability to defend against benefit claims.

Here, coal mine operators seek a restrictive interpretation of 20 C.F.R. § 727.203 and attack the decision of the Fourth Circuit below. As in *Usery*, the operators' arguments should be rejected. As shown below, the express language and structure of the regulation as well as the lengthy legislative history surrounding the Black Lung Act, as amended, compel the conclusion that the interim presumption may be invoked upon the showing of ten years of coal mine employment and the production of a single item of qualifying evidence. In addition, the Petitioners' claim that the Secretary's position is entitled to deference by this Court is not supported and the Administrative Procedure Act does not mandate the interpretation sought by Petitioners.

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[1] The total household income from all sources for miner recipients is only $11,740 and for widow recipients is $8,170. U.S. Department of Labor Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 17 (1983).

ARGUMENT

I. THE EXPRESS LANGUAGE AND THE STRUCTURE OF SECTION 727.203 SUPPORT THE INTERPRETATION THAT THE PRESUMPTION IS INVOKED UPON A SHOWING OF TEN YEARS OF COAL MINE EMPLOYMENT AND THE PRODUCTION OF ONE ITEM OF QUALIFYING EVIDENCE

For support of the Fourth Circuit's interpretation of the interim presumption, one need go no further than the language and structure of Section 727.203 itself. Under subsection (a) of the regulation, a miner must prove that he has engaged in coal mine employment for ten years and then may invoke the presumption if he meets one of four distinct medical requirements. Subparagraphs (1) and (4) of subsection (a), by their own terms, provide that a single qualifying x-ray or a single physician's opinion that a claimant has a disabling pulmonary impairment will suffice to trigger the presumption. Sub-paragraph (a)(1) refers to "*a* chest [x-ray]" and (a)(4) refers to the documented opinion of "*a* physician exercising reasoned medical judgment" (emphasis supplied).

Under sub-paragraphs (a)(2) and (3), the regulation uses the term "ventilatory studies" and "blood gas studies" in the plural. However, as Judge Hall pointed out below, the regulations which define how ventilatory and blood gas tests are conducted reflect that such tests consist of a set of multiple studies. (Pet. App. 20a-21a).[2] In light of these regulations, it is certainly reasonable to interpret the language of sub-paragraphs (a)(2) and (3) to require only one qualifying set of ventilatory or blood gas studies to invoke the presumption.

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[2] The Federal Respondent cites two regulations which use the word "study" in the singular. Brief of the Federal Respondent, p. 18, n.16. A close examination of those provisions, however, reveals that the word "study" in each case is used to connote only a single component of the set which invokes the presumption.

Both the Petitioners and the Federal Respondent place great emphasis on the word "establishes" in subsection (a) of the regulation. They construe this word to mean that a claimant must prove each of the medical requirements by a preponderance of the evidence. By doing so, the parties misconstrue the word "establish." As Judge Hall indicated in his opinion,

> " 'Establish' as used in Part (a) simply means that the claimant must prove at least one of the factual prerequisites to invoke the presumption, i.e. one qualifying x-ray, one set of qualifying ventilatory or blood gas studies, or the documented opinion of one physician. As used in Part (b), 'establish' means that the employer must prove the facts necessary to rebut the presumption and ultimately to persuade the factfinder that the claimant is not entitled to benefits."

(Pet. App. 22a, n. 8)

In other words, a claimant must prove that the item of medical evidence he submits meets certain requirements of reliability and authenticity, see 20 C.F.R. § 727.206(a) (incorporating Subpart D of Part 410 of Title 20), and that such evidence meets the qualifying standards in subsection (a) of the regulation.[3] This is what subsection (a) requires of the claimant to invoke the presumption.

The Fourth Circuit's interpretation is further supported by the inclusion of the "all relevant evidence" requirement in only subsection (b) of the regulation. Congress required in the statute that "in determining the validity of claims . . . all relevant evidence shall be considered . . . ." 30 U.S.C. § 923(b). The Secretary of Labor, mindful of this requirement but also aware of Congressional intent, specifically placed in the rebuttal stage the requirement that all relevant medical evidence

[3] As shown elsewhere, respondents frequently attack the reliability and authenticity of medical evidence under the cited regulations.

be considered in adjudicating a claim. Had the Secretary meant to require that all relevant evidence be considered when invoking the presumption, it would have been simple and more logical to have placed the "all relevant evidence" language at the beginning of Section 727.203. This was not done.[4]

On the other hand, the reading of the regulation advanced by Petitioners and the Federal Respondent would, in some cases, make the rebuttal section of the regulation superfluous and run afoul of the congressional direction that the presumption not be irrebuttable. For example, as the Federal Respondent acknowledges, under (a)(1), if by a preponderance of x-ray, biopsy or autopsy evidence, a claimant proves that he suffers from pneumoconiosis, as a practical matter there is no further evidence that the coal mine operator could submit on rebuttal to refute the establishment of the disease pursuant to (b)(4). Brief of Federal Respondent, pp. 23-24. The operator would either have to offer the same evidence he had offered during the invocation stage (Pet. App. 96a-97a (Opinion, Widener, J.)) or the presumption

[4] Petitioners argue that the "where relevant" language of Section 413(b), 30 U.S.C. § 923(b), requires the trier of fact to weigh all evidence at the invocation stage of the presumption. (Petitioners' Brief, p. 24). Section 413(b) reads in relevant part, "in determining the validity of claims under this part, all relevant evidence shall be considered, including, *where relevant*, medical tests such as blood gas studies . . . ." (emphasis supplied). Petitioners argue that since a respondent's contrary evidence would be "relevant" at the invocation stage, Section 413(b) mandates its introduction at that time. In other words, Petitioners would define "where relevant" as pointing to a specific chronological point in the evidentiary process.

This argument is specious and misreads Section 413(b). The section lists ten categories of evidence which may be used to support a claim. Without the "where relevant" language, this section would require the trier of fact to consider evidence in all ten categories before he could determine the validity of a claim. The "where relevant" qualifier means that the trier of fact need only consider the evidence in those categories introduced by the parties in a particular case.

that the claimant has pneumoconiosis must be treated as irrebuttable (Pet. App. 21a (Opinion, Hall, J.)). This clearly conflicts with the congressional and agency intent.

Petitioners attempt to circumvent the plain meaning of Section 727.203(a) by repeatedly, and incorrectly, arguing that the Fourth Circuit's interpretation would effectively deprive the coal mine operator of the opportunity to prevent invocation of the interim presumption. Petitioners rashly assert:

> "The court below held that *any* single piece of evidence, regardless of reliability or weight, is sufficient to invoke the presumption. The defendant, in turn, has no right to question or challenge claimant's invoking evidence."

Petitioners' Brief, p. 6.[5]

Likewise, the Amicus National Coal Association claims that the Fourth Circuit view of the interim presumption would permit eligibility for benefits "as a matter of law by presumption of any supporting evidence whether or not such evidence is credible or reliable, or the fact to be found on the basis of it is supported by a preponderance

[5] Likewise, Petitioners assert that the Fourth Circuit's single evidence invocation "gives possibly false evidence absolute judicial protection," *Ibid.* at 28, and claims that the Fourth Circuit holding "largely ousts judicial review of invocation fact-finding." *Id.* at 42 (fn. 55). These assertions continue a pattern beginning in the Petition for Writ of Certiorari where the Questions Presented section includes a statement that the Fourth Circuit permitted invocation "as a matter of law by presentation of any supporting evidence whether or not such evidence is credible or reliable. . ." Petition for Cert. at (i), and claims that, "The Fourth Circuit's unique holding has, in effect, made the invocation of this presumption an *ex parte* phase of the proceeding." *Id.* at 10. The Petitioners further claim that the Fourth Circuit's interpretations preclude the "effective right of cross-examination in the invocation phase" and "created a phenomenon which, petitioners believe, is unknown in federal civil litigation in the United States—an offer of proof of material fact which cannot be refuted, must be accepted by the trier of fact and is not, in effect, subject to appellate review." *Id.* at 14.

of the relevant evidence." Brief of Amicus National Coal Association, p. 4.[6]

These bold assertions by Petitioners and the National Coal Association are patently false.[7] An operator or other

[6] When confronted by the almost identical claims in the petitions for rehearing in *Revak v. National Mines Corp.*, discussed *infra*, the Third Circuit replied that it was "unpersuaded by the predictions *in terrorem* about the impact of our decision. Under our holding, and under the plain language of the regulation, the weighing of evidence that does not occur before invoking the presumption simply occurs at the rebuttal stage. All relevant evidence must be considered at that point, and the mine operators may rebut on the basis of all the grounds provided by § 727.203(b)." Op. Sur Denial of Panel Rehearing at 3 (March 6, 1987).

[7] In contrast to the Petitioners' assertions, the Director asserts that the invocation question is of relatively little practical significance. (Brief of Federal Respondent, pp. 16-17). This assertion is in one sense correct but in a more fundamental sense misses the point.

It is true that in a well litigated federal black lung case, because all evidence must be considered at the rebuttal stage, the question of whether the claimant is totally disabled as a result of a respiratory impairment arising from coal mine employment will very often be determined in the exactly identical way whether the presumption is invoked by a preponderance of the evidence or by a single item of evidence within a given category. At the same time, this will often not be true. As the Director indicates, approximately 10,000 pending claims will be affected by this decision. Brief of Federal Respondent, p. 3. Very often, at some point during the many years of administrative and appellate litigation of a black lung claim, the claimant becomes unable to undertake additional testing. Many elderly coal miners suffer strokes, heart attacks and other disabling conditions which make further testing impossible. More tragically, many miners die. This frequently means that items of evidence within a given category may no longer be developed and only a single or small number of items of evidence exist. The question of the method of invocation then often becomes ultimately determinative.

As discussed elsewhere in this Brief, Congress looked long and hard at this problem and determined that the risk of such incomplete medical knowledge in a given claim, whether because of the unavailability of the claimant or the lack of reliable medical techniques, should be borne, not by the claimant, but by the party attempting to prevent eligibility. This decision was consciously and

party seeking to prevent invocation ma[illegible]tack evidence submitted on behalf of the claimant in at least four ways: (a) questioning years of coal mine employment; (b) contesting the authenticity of the medical evidence proffered; (c) disputing the qualifications of the medical source of a given piece of evidence; and (d) establishing that the quality and reliability standards required by the regulations have not been met.

Since Congress found during the extensive hearings undertaken in 1972 and 1977 that exposure to coal dust for more than ten years was likely to lead to pneumoconiosis, the regulation's initial requirement is proof of more than ten years of eligible work. The operator may challenge the claimant's assertion of work years. A plethora of cases exists at the administrative and court level in which this issue was litigated in substantial detail. *See, e.g., Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984), and cases cited therein; *Settlemoir v. Old Ben Coal Co.*, 9 B.L.R. (MB) 1-109 (1982). Likewise, the party opposing invocation may question the authenticity of any particular document.

The qualifications of the source of an item of evidence may be, and often are, questioned. The regulations specifically require that interpretation of x-rays for certain purposes be credited if taken by Board-certified or Board-eligible radiologists. 20 C.F.R. § 727.206(b)(1).

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explicitly made by Congress. Thus, the Federal Respondent's Brief misses the point in that the question of who has the burden of proof is sometimes dispositive where there is limited knowledge due to the availability of the claimant, medical facilities or medical techniques. Finally, the fact that a decision favorable to claimants would compel reconsideration of a large number of denied claims should not dissuade this Court from so ruling. *See In Re: James Sebben, et al. v. William E. Brock, III et al.*, Nos. 86-1295, 86-1315, slip op. (8th Cir. filed Mar. 25, 1987) (certifying as a class certain claimants denied the benefit of 727.203(a)(1) and not afforded the opportunity to submit a claim under 410.490).

Finally, and most importantly, the operator may and frequently does, challenge the quality and reliability of particular tests submitted on behalf of a claimant.[8] Again, the regulations set forth specific standards for the quality and reliability of medical evidence. For example, chest x-rays must be interpreted according to the ILO-U/C International Classification of Radiographs of Pneumoconiosis, 1971 or similar standards. 20 C.F.R. § 410.428(a). Ventilatory studies must contain certain specific data including the forced expiration volume in one second (FEV_1) and the maximum voluntary ventilation (MVV), which must be expressed in liters or liters/minute and must include "three appropriately labeled spirometric tracings, showing distance per second on the abscissa and the distance per liter on the ordinate" with a paper speed for the FEV_1 of at least 20 mm/second as well as other specific requirements. 20 C.F.R. § 410.430.

These quality standards were carefully selected by the Secretary (*see, e.g.*, 43 Fed.Reg. at 36,826) and provide medical tests with a degree of reliability at least sufficient to satisfy the claimant's initial burden to produce evidence to establish the presumption. Judge Widener, in his opinion below, explicitly stated that he was persuaded to adopt the single evidence standard for invocation at least in part because of the safeguards provided by the quality standards:

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[8] Indeed, the author of Petitioners' Brief, at another time, stated explicitly: "Another point uniformly applied is that evidence not meeting applicable quality standards may not be used to invoke the interim presumption," citing *Carroll v. Califano*, 619 F.2d 1157 (6th Cir. 1980); *Sharpless v. Califano*, 585 F.2d 664 (4th Cir. 1978); *Johnson v. Califano*, 585 F.2d 89 (4th Cir. 1978); *Welsh v. Weinberger*, 407 F.Supp. 1043 (D. Md. 1975); *Ward v. Matthews*, 403 F.Supp. 95 (E.D. Tenn. 1975); *Harness v. Weinberger*, 401 F.Supp. 9 (E.D. Tenn. 1975). Solomons, "A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues," 83 *W.Va. L. Rev.* 869, 903-904 (1981). *See also* Federal Respondent's Brief, p. 8, n.7.

> "This interpretation is particularly acceptable to me in light of the fact that an X-ray or blood gas or ventilatory tests must meet precise standards prescribed by the regulations to qualify to invoke the presumption." [citation to regulations omitted]

(Pet. App. 94a-95a)

Finally, it is worthy of remembrance at this point that the Fourth Circuit also found that all relevant evidence must be considered at the rebuttal stage. 20 C.F.R. § 727.203(b). The consequences for this case are clear: as indicated by the Federal Respondent, "the basic fact thus 'established' at the invocation stage remains fully open for relitigation on rebuttal, with the burden of persuasion having shifted to the operator or Director." Brief of Federal Respondent, p. 15. Consequently, if a coal operator has evidence which in its view overcomes the claimant's invoking evidence, the operator has ample opportunity to present it at the rebuttal stage of the case. Such would be the result in the two cases cited by Petitioners in their Brief: *Haynes v. Jewell Ridge Coal Corp.*, 790 F.2d 1113 (4th Cir. 1986), and *Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986) cited in Petitioner's Brief, pp. 28, 29. In each of these cases the coal operator apparently had substantial evidence which, when offered, would preponderate and rebut the presumption. If anything, these cases prove rather than disprove the proposition that the rights of the operator are fully protected by the opportunity to present all evidence in rebuttal, and that if that opportunity is grasped, no unjust results will obtain.

Thus, the shrill cry of the operators that they are faced with the invocation of the presumption based upon a single piece of evidence which they cannot challenge with regard to reliability is baldly fallacious. The plain fact is that operators may and frequently do challenge the accuracy and reliability of such evidence at the invocation stage and offer all of their evidence in rebuttal. Their claims to the contrary tend to reveal their actual

purpose of these arguments—to undo the burden consciously placed upon them due to imperfect knowledge as explicitly established by Congress in 1977.[9]

II. THE LEGISLATIVE HISTORY OF THE BLACK LUNG ACT COMPELS THE CONCLUSION THAT A CLAIMANT MAY INVOKE THE PRESUMPTION OF SECTION 727.203(a) BY PRODUCING A SINGLE ITEM OF QUALIFYING EVIDENCE

Although the express language and structure of Section 727.203 provide an ample basis for the Fourth Circuit's decision, a review of the legislative history surrounding the Black Lung Act, as amended, compels the same result. Although the issue directly involved here relates to an agency regulation, a review of the legislative history is singularly appropriate here for two reasons. First, as Judge Sprouse explained below:

> ". . . the circumstances surrounding the drafting and promulgation of the interim presumption regulation represent an unusual turn in administrative law. Contrary to the usual interpretative posture, agency intent here can be inferred directly from congressional action because congressional staff worked directly with the Labor Department to tailor the final version of the interim presumption."

(Pet. App. 61a) Secondly, from passage of the Act in 1969 to promulgation of the interim presumption regulation in 1978, Congress was uniquely concerned with the procedural and evidentiary obstacles which it viewed as impeding its efforts to provide benefits to deserving coal miners. Most of the legislative history reflects the congressional effort to eliminate those obstacles.

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[9] The kind of burden shifting found in § 727.203(a) is not unique in federal law. For example, in a more extreme case, under 21 U.S.C. § 881 (which incorporates the customs statute, 19 U.S.C. § 1615) the government need only show that there is probable cause that property it wishes to seize was used in connection with criminal activity. Once probable cause is shown, the burden shifts to the party claiming the property to establish his claim to the property by a preponderance of the evidence. *See, United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276 (9th Cir. 1983).

The Black Lung Act was an amendment adopted as part of the Federal Coal Mine Health and Safety Act of 1969. The FCMHSA was a sweeping congressional effort providing safety and health standards in an attempt to arrest the inordinate toll in deaths, sickness and injury in the coal mining industry. One particular health hazard addressed by the Act was the high level of coal dust affecting the respiratory systems of coal miners.[10]

From the moment the Black Lung Amendment was first introduced, Congress acknowledged that it was dealing with a very unique occupational disease and social problem. During the debates Senator Javits stated:

> "This [Black Lung Amendment] is an unusual and dramatic proposal—but it is directed at an unusual and dramatic problem—our sublime insensitivity to what is probably the worst occupational disease in the country—black lung."

115 Cong. Rec. 27,627 (1969).

Similarly, in the House, Congressman Perkins argued that Congress should single out black lung for special federal treatment:

> ". . . we should not lose sight of the fact that we are dealing with a special compensation statute solely because this occupation is so hazardous. There are 10 times more fatal accidents in this industry than in all other industries. We have a disease here that may have been contracted 10 or 20 years ago, but the individual will never be compensated for it because the States will never enact retroactive laws to provide compensation for it. It is because of the insidious nature of this disease, pneumoconiosis, that we are enacting this special provision."

115 Cong. Rec. 32,015 (1969).

After enactment of the black lung program, however, Congress found that its original intent was being

[10] See Section 202 of the Act, as amended, 30 U.S.C. § 842, which provides certain standards for the maximum allowable amount of coal dust in the coal mine air.

thwarted. During the first two years of the program, few black lung claims were approved and members of both Houses proposed amendments to the original Act to speed up processing and increase the percentage of claim approvals.

The difficulties which deserving claimants experienced at the hands of the Social Security Administration brought these problems squarely before Congress during the debate leading up to the 1972 Amendments. The legislative history surrounding those Amendments is replete with testimony and discussion that the existing medical techniques and facilities to test for black lung were inadequate to reliably deny claims. During the House floor debate on the 1972 Amendments, Congressman Bevill noted:

> "The assessment of damage to health is, under many circumstances, an imperfect art . . . . We have to keep in mind that there was a time when physicians could not even agree on a definition for black lung disease."

117 Cong. Rec. 36,497 (1971). Congressman Reid stated:

> "Testimony indicates that only 28 percent of the black-lung applications have been approved in Kentucky, 44 percent in West Virginia and 69 percent in Pennsylvania. Just because Pennsylvania has had an effective state black-lung compensation law, and better medical facilities for examinations, the approval rate for applications under Federal law has been higher. In my view, it is unfair to penalize a coal miner or his widow in Kentucky or West Virginia just because the medical facilities or records are unavailable."

H. R. Rep. No. 460, 92d Cong., 1st Sess., at 33 (1971) (Separate Views of Congressman Reid).

The use of negative x-ray readings by SSA to deny claims came under particularly sharp attack by Congress.[11] In criticizing the use of the x-rays and the sim-

[11] The use of x-rays was most prevalent because of the lack of facilities to administer more specialized pulmonary function and

ple breathing test, Congressman Hechler told the full House that:

> "On September 12, 1971, a statement by 12 doctors assembled in Beckley, WVa., indicated that the Social Security Administration's use of a single chest X-ray and simple breathing test was 'unduly and unnecessarily restrictive.' Dr. John Rankin, chairman of the department of preventative medicine at the University of Wisconsin and a specialist in lung disease said the simple breathing test employed by the Social Security Administration often fails to measure black lung disability. The New York Academy of Sciences sponsored an international conference on coal workers' pneumoconiosis on September 13 through 17, and lung specialists from all over the world presented their analyses of how to test and measure pneumoconiosis. These papers conclusively demonstrate that you cannot rely on a simple X-ray to determine either the presence of pneumoconiosis, or the extent of disability resulting from it."

117 Cong. Rec. 36,506 (1971).

In light of these problems, the 1972 Amendments liberalized eligibility criteria, extended coverage and specifically prohibited the denial of a claim based solely upon a negative x-ray. In addition, both Houses of Congress in the debates and reports leading up to the 1972 Amendments, admonished the Social Security Administration to adopt new procedures to alleviate the backlog of claims in light of the documented lack of medical facilities and techniques. During the House floor debate on H.R. 9212, Congressman Helstoski stated:

> ". . . the Social Security Administration must recognize the human problems involved here and compassionately assist miners and their families in trying to prove their eligibility for black lung benefits.
>
> After decades of neglect by coal mine operators, company doctors, and lax State officials, it is no surprise to find that miners in States such as Kentucky and West Virginia have difficulty in proving their eligibility for the benefits program. Testing facilities usually did not exist and medical records have been scanty or misleading. The Social Security Administration must, therefore, bend over backwards and give the benefit of the doubt to the miner or his survivors."

117 Cong. Rec. 40,439 (1971).

Similar, but more specific, commands came from the Senate side of the aisle:

> ". . . the backlog of claims which have been filed . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly, the [Senate] Committee expects the Secretary [of HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [in the HEW annual report]."

S. Rep. No. 743, 92d Cong., 2d Sess., at 18 (1972).

In response to these directions, the Social Security Administration promulgated the predecessor to the interim regulation at issue here. 20 C.F.R. § 410.490. As admin-

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blood gas tests. In fact, during the House floor debate on H.R. 9212, Congressman Reid noted that the blood gas testing was only then being pioneered and indicated that the Social Security Administration objected to the blood gas tests because they were thought to be too complicated and required too much medical expertise to be widely used. 117 Cong. Rec. 36,502 (1971).

istered by SSA,[12] the interim presumption had its desired effect and the approval rate of claims filed with the SSA increased significantly. However, the SSA interim presumption did not apply to claims filed after June 30, 1973, which were to be administered by the Department of Labor under Part C of the Act.

Criticism directed at the Department of Labor continued to focus on the lack of medical techniques and facilities, and the unreliability of using non-qualifying evidence to deny claims. In September of 1974, the Solicitor of Labor wrote to the General Counsel of HEW and urged that the Social Security Administration authorize the application of the interim presumption to claims handled by the Department of Labor. In that letter the Solicitor raised the same concerns that had been raised by Congress:

> "It must also be noted that those few claimants . . . who are willing to engage in the further pursuit of proof of entitlement must subject themselves to a battery of expensive, time consuming and often unpleasant medical procedures. Frequently, there are no facilities available to conduct these tests near the claimant's residence. The 1972 Amendments were enacted largely to ease the difficult evidentiary burden facing all black lung claimants. Social Security has negated this intent insofar as transitional and Part C claimants are concerned by promulgating variant standards of eligibility which will certainly result in the denial of benefits to an unknown number of worthy claimants who, within the intent of the 1972 amendments, should be found eligible."

Letter from Department of Labor Solicitor Kilberg to HEW General Counsel Rhinelander (Sept. 13, 1974) reprinted in H.R. Rep. No. 151, 95th Cong., 1st Sess., at 17 (1977).

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[12] As discussed *infra*, SSA was later criticized by some who felt that SSA was treating the interim presumption as essentially irrebuttable and awarding benefits based upon a single item of qualifying evidence without rebuttal inquiry.

While the debate in Congress continued, this Court sustained, *inter alia*, against constitutional attack, the statutory presumptions in the Black Lung Act and the prohibition against using a chest x-ray to defeat a claim for benefits. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In rendering its decision, this Court recognized the validity of Congress' informed decision to shift the evidentiary burdens and to resolve doubts in favor of the disabled miner because of the unreliability of medical evidence. This Court noted that the reliability of negative x-ray evidence was "debated forcefully on both sides before the Congress" and that the Court would not engage in a judicial reconsideration of the conclusions of Congress on the issue. *Ibid.* at 33.

The legitimacy of Black Lung presumptions having been upheld by this Court, members of Congress continued to seek similar ways to ease the evidentiary burden of claimants. A proposal was offered which would have instructed the Secretary of Labor to apply standards "no more restrictive than" those contained in the SSA interim presumption to all claims handled by the Department of Labor. By the time this proposal was considered by the 95th Congress in 1977, however, the use of the SSA interim presumption was itself being hotly debated. Those advocating the expanded use of the presumption argued that the "new facilities" and "new medical procedures" referenced specifically in the 1972 Senate direction to SSA had not yet become a reality and therefore the unreliability of current medical testing necessitated the use of the interim presumption. See H.R. Rep. No. 151, 95th Cong., 1st Sess., at 15 (1977).

Others, however, harshly criticized the SSA presumption and argued against its expanded use. Dr. Herbert Blumenfeld, for example, who was working at SSA at the time he appeared before the Senate Subcommittee on Labor and Public Welfare testified that the only "practicable way" SSA could respond to the 1972 Senate's ad-

monition was to establish criteria which permitted an award if some level of disease is detected whether or not any impairment was present. Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess., 194 (1977). These divergent views made it clear that those in Congress who sought expanded use of the interim presumption faced a difficult fight.

Despite this controversy, the House passed a version of the Black Lung Benefits Reform Act of 1977 which required the Secretary of Labor to apply standards "no more restrictive than" those contained in the SSA interim presumption. As passed by the House the presumption was to apply to *all* claims filed with the Secretary of Labor and not just on an interim basis. The Senate, however, rejected the use of the SSA interim presumption and its version authorized the Secretary to promulgate permanent medical eligibility criteria as he saw fit. These sharply contrasting views foreshadowed the bruising fight which would ensue between the House and Senate conferees over use of the presumption.

After four months of vigorous debate and considerable "stress and strain" between the conferees, a compromise was reached which resulted in an apparent victory for both sides. *See* 124 Cong. Rec. 2332-3 (1978). (Statements of Reps. Randolph and Williams on the passage of the Conference Report on H.R. 4544). Rather than working out their differences the conferees simply merged the Senate and House bills. According to the compromise the House won the expanded use of a presumption which could be "no more restrictive" than the presumption standards employed by SSA. However, the use of the presumption by DOL would only be for an interim period until, as the Senate had authorized, the Secretary had promulgated new permanent Part C medical eligibility regulations. See 30 U.S.C. § 902(f)(2).

Pursuant to the 1977 Amendments, the Department of Labor then drafted new interim regulations. Prior to publication, congressional staff worked directly with the Labor Department to draft the final version:

> "The final draft of the [Labor] Department's new regulations were approved within the Department and, prior to publication, sent to selected congressional staff members for review and presumably for approval. These regulations were reviewed by both congressional staff and professional persons associated with the various black lung associations. As a result of this initial review, the Department's proposed 'interim presumption,' after close scrutiny, was severely criticized. Other parts of the regulations were also criticized, thus failing to win the approval of those reviewing the proposal."
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> "One of the proposed sections would have prohibited the approval of a claim unless the file demonstrated that a full series of medical tests had been conducted. The Black Lung Association and congressional staff objected strenuously and the section was removed."

Solomons, *supra*, 896, 896 n. 138. More specifically for the inquiry in this case, the congressional staff struck a provision similar to the construction of the interim presumption the Petitioners and Director argue for here:

> "Another provision would have required the adjudicator to weigh all the medical test evidence to determine whether the weight of this evidence established total disability. This too was stricken by congressional command."

Id. at p. 897 n. 138.

That the Secretary ultimately agreed to a regulation which would allow invocation of the presumption on the basis of a single item of qualifying medical evidence is reflected in the comments of the Secretary which accompanied the final promulgation of the interim presumption:

> ". . . the Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence. This does not mean that the *single item of evidence which establishes the presumption* is overcome by a single item of evidence which rebuts the presumption." (emphasis supplied)

Notice of Final Rule Making Under The Black Lung Benefits Reform Act of 1977, 43 Fed. Reg., 36,826 (1978). As Judge Widener of the Fourth Circuit stated below, these comments expressly reveal that the Secretary's intention was to allow invocation merely upon the production by the claimant of single item of qualifying evidence. (Pet. App. 94a).[13]

The conclusion that can be reached from all of the foregoing is that Congress meant for the invocation of the presumption to be liberal in order to facilitate the ability of coal miners to prove their claims. From the passage of the Black Lung Act in 1969 through the promulgation of the regulation in 1978, Congress continued to hear evidence that imprecise medical tests were an unreliable basis for denying claims. In 1972, Congress admonished the Social Security Administration to liberalize its criteria and promulgate an interim presumption to facilitate the processing of claims and significantly increase the percentage of black lung awards.

With respect to Department of Labor claims, Congress continued to debate the ability of the medical community

[13] The Petitioners in their Brief argue that this Comment only posits an example of the Department's intention that all relevant rebuttal evidence be considered. Brief of Petitioners, p. 30, n.45. This interpretation ignores the plain meaning and consequence of the second sentence of the Comment. The basic point is that a single item of evidence offered by the coal operator or Director is not considered until the rebuttal stage of the proceeding. The Comment does not contemplate any distinction between a single item of "like kind evidence" or a single item of "other relevant" evidence.

to reliably detect the presence or absence of black lung in a coal miner's lungs. By 1977 there was considerable controversy over use of the interim presumption in Department of Labor claims. The House mandated usage; the Senate did not. After much heated debate, the conferees reached a compromise allowing the use of the presumption for a specific period until the Secretary of Labor could promulgate permanent medical criteria. Thereafter, the Secretary worked closely with congressional staff in drafting the interim presumption at issue here so that agency intent can be inferred from congressional intent. Finally, the comments accompanying the regulation clearly indicate that the Secretary intended invocation upon the production of a single item of qualifying evidence.

III. THE PETITIONERS' ARGUMENT CONCERNING CONSISTENCY OF INTERPRETATION AND DEFERENCE IS WITHOUT MERIT

Turning next to the argument concerning interpretation of the regulation over time, Petitioners argue that weighing relevant evidence prior to invocation is "the consistent and unwavering fifteen-year construction of the invocation provisions of the interim presumption by multiple Secretaries of HHS and Labor . . . ." Petitioners' Brief, p. 33.[14]

It must be emphasized that the Petitioners' treatment of this subject does not rely upon a formal statement of agency policy to support this proposition.[15] Rather, it

[14] The Director less strongly asserts simply that "it has long been clear that all like-kind evidence is weighed in determining invocation of the presumption available to Part B claimants under 20 C.F.R. 410.490(b)." Federal Respondent's Brief, p. 31.

[15] In its denial of petition for rehearing in *Revak v. National Mines Corp.*, discussed *infra*, the Third Circuit observed that "it is not a simple matter for us to derive the Director's position from judicial or agency decisions, and the briefs in the cases relied on by the parties to show the Director's 'consistent position' are not readily accessible to us." Op. Sur Denial of Panel Rehearing at 3 (March 6, 1987).

supports this assertion by citation of cases which it claims indicate a consistent practice of weighing all evidence within a given category.[16]

Judicial review of agency action in black lung claims is not the uniform pattern asserted by Petitioners in support of the weighing of evidence at the invocation stage. The Seventh Circuit in *Amax Coal Co. v. Director, OWCP*, 801 F.2d 958, 962 (7th Cir. 1986), explicitly agreed with the standard enunciated by the Fourth Circuit in the instant case. Crucially, the Seventh Circuit also observed that, "the Fourth Circuit's holding that a single physician's opinion permits an ALJ to invoke the § 727.203(a) presumption is in accord with our decisions." *Ibid.*[17] *Cf. Kuehner v. Ziegler Coal Co.*, 788 F.2d 439 (7th Cir. 1986).

While mixed, the earlier Sixth Circuit precedent does not support the claim that there has been a consistent fifteen-year interpretation of the interim presumption. *Hatfield v. Secretary of HHS*, 743 F.2d, 1150, 1155 (6th Cir. 1984) (single positive x-ray triggers presumption);

[16] A review of the cited cases reveals that most involved situations in which the litigants chose to argue other issues and did not brief and argue the issue whether a single piece of evidence invokes the interim presumption. Moreover, an agency position propounded solely for the purpose of litigation should not be entitled to deference and should carry weight only to the extent that it is persuasive in its own right. *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977); *Kickapoo Oil Co. v. Murphy Oil Corp.*, 779 F.2d 61, 67 (Em. App. 1985). Judge Widener below, for example, indicated his "hesit[ancy] to extend the concept of deference so as to permit any agency in such a posture effectively to resolve appeals by its own actions. This would abdicate much of the responsibility for appellate review of federal administrative agencies to the agencies for self review." (Pet. App. 60a).

[17] In a relatively obvious reference to the reasoned opinion inquiry which is to be undertaken at the invocation stage by the ALJ, the Seventh Circuit went on to hold that a single piece of evidence "permits—although it does not necessarily require—an ALJ to invoke the § 727.203(a)(4) presumption." 801 F.2d at 962.

Haywood v. Secretary of HHS, 699 F.2d 277, 283-285 (6th Cir. 1983) (same); *Miniard v. Califano*, 618 F.2d 405 (6th Cir. 1980) (same); *Dickson v. Califano*, 590 F.2d 616, 622-23 (6th Cir. 1978) (same); *see also Singleton v. Califano*, 591 F.2d 383 (6th Cir. 1979) (other medical evidence). Recently, with no discussion of the legislative history, the structure of the regulation, or the APA, a panel in the Sixth Circuit simply asserted that since earlier cases permitted weighing of evidence, the Sixth Circuit had not adopted the Fourth Circuit's view below. *Back v. Director, OWCP*, 796 F.2d 169 (6th Cir. 1986); *see also Engle v. Director, OWCP*, 792 F.2d 63 (6th Cir. 1986). This very brief panel decision contained no analysis of any of the major issues discussed by the Fourth Circuit in the instant matter below nor did it contain a detailed review of its own Circuit's earlier cases, many of which were not consistent with the panel's view.

A far more thorough and complete analysis of the underlying issues involving the question of the proper method for invoking the interim presumption was undertaken by the Third Circuit in *Revak v. National Mines Corp.*, 808 F.2d 996 (3rd Cir. 1986). In that case a miner with thirty-five years of underground coal mine experience was denied benefits by an ALJ and the Benefits Review Board upon a finding that he had not offered sufficient evidence to invoke the interim presumption. In reversing the ALJ and BRB, the Third Circuit agreed with the Fourth Circuit's analysis below and found that the claimant had produced sufficient evidence in the form of a reasoned doctor's opinion and a ventilatory study to invoke the 727.203(a) presumption. The Third Circuit indicated that its decision was consistent with that of the Fourth Circuit below and the Seventh Circuit in *Amax Coal*, but in contrast to the Sixth Circuit in *Engle*. The Third Circuit noted that the "*Engle* court provided no reasoning for [its] position." *Ibid.* at 1000.

In reaching its decision, the Third Circuit undertook a far more complete analysis of the arguments for and against the balancing of evidence at the invocation stage. The Court stated:

> "The most important reason for rejecting the balancing approach to the interim presumption is the language and structure of the regulation itself."

Id. at 1000. After an analysis of the structure of the regulation, it gave a persuasive example of the erroneous result which a balancing test would necessitate:

> "One explicit ground for rebuttal, § 203(b)(4), is that all the relevant evidence demonstrates that the miner does not have pneumoconiosis. [footnote omitted]. Such a provision would be superfluous if the ALJ were already to have considered all the relevant medical evidence at the initial presumption stage. Moreover, the appellees' theory would place the burden on the miner to prove by a preponderance of the medical evidence at the presumption stage that he had pneumoconiosis. Such an interpretation would *deprive the interim presumption of any presumptive effect.*" [footnote omitted] (emphasis supplied)

Id. at 1001.

The *Revak* Court went on to analyze the legislative history and found that it supported its view of single evidence invocation. It noted that a study cited by Congressman Paul Simon found that autopsies of 400 coal miners with more than twenty years of coal mine experience indicated that 90-95% of them suffered from pneumoconiosis. *Id.* at 1002. The Court noted that such evidence provided an empirical basis upon which the single positive test method of invocation would rest, "thus shifting some of the risk of faulty test results onto the employer." *Id.* at 1002. Likewise, it found that deference to alleged agency interpretation was inappropriate. *Id.* at 1002-1004.

Finally, lack of consistency of interpretation is illustrated even within the Fourth Circuit prior to the instant case in the matter of *Consolidation Coal Co. v. Sanati*, 713 F.2d 480 (4th Cir. 1983). That case involved the question of the proper method of invoking subparagraph (a)(4) of the 727.203 interim presumption:

> "The ALJ, however, invoked the presumption solely on the basis of one physician's opinion, reasoning that the documented and reasoned opinion of one physician alone requires the invocation of the presumption under (a)(4) regardless of the existence of, and without weighing, other contrary evidence. The Benefits Review Board affirmed the ALJ's determination [citing *Stiner v. Bethlehem Mines Corp.*, 3 B.L.R. (MB) 1-487 (1981)]."

Ibid. at 481. Without discussing the structure of the provision in question or the legislative history, the 2-to-1 panel majority in *Sanati* held that, "the claimant has the burden of proving by preponderance of the evidence all the facts necessary to establish the presumption." *Id.* at 482. This ruling was, of course, explicitly overruled by the Fourth Circuit in the case now before this Court.[18]

IV. SECTION 7(c) OF THE APA, BY ITS OWN TERMS, DOES NOT REQUIRE THAT THE REGULATION BE READ TO REQUIRE THE PREPONDERANCE OF THE EVIDENCE STANDARD IN RELATION TO INTERIM PRESUMPTION INVOCATION FACTS

As a fallback position, Petitioners advance the argument that Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), requires that a preponderance of the evidence standard be read into subsection (a) of 20 C.F.R. § 727.203. The Petitioners assert that reserving consideration of a coal operator's contrary evidence to subsection (b), the rebuttal phase, violates the policies

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[18] It is instructive to note that one of the two-Judge majority in *Sanati* was Judge Widener, who upon a detailed analysis of the issues involved came in the instant matter below to side with the majority concerning single evidence invocation.

embodied in the APA. This argument misses the mark. As shown below, Section 7(c) is inapplicable to the invocation phase of the interim presumption and both the letter and the policy of the APA are met by requiring the consideration of "all relevant evidence" in rebuttal.[19]

It is unnecessary for this Court to reach a determination on that issue. As shown, Section 7(c), by its own terms, does not apply to the invocation stage of the presumption.

Section 7(c) of the APA, 5 U.S.C. § 556(d), provides in relevant part:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . ."

Section 7(c) applies by its terms only to "rules," "orders," and "sanctions." The mere invocation of a pre-

[19] The Federal Respondent makes the argument that Section 7(c) of the APA has been expressly superceded by the Black Lung Act. Brief of Federal Respondent, p. 34, n.30. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates by reference Section 19 of the Longshore Act, 33 U.S.C. § 919. Section 919 in turn generally incorporates the APA provisions, including Section 7(c). However, the Black Lung statute contains an express exception to these incorporations where "otherwise provided . . . by regulations of the secretary." 30 U.S.C. § 932(a). The Director also points out that the first sentence of Section 7(c) itself begins "except as otherwise provided by statute . . ." The Director argues that "[t]hose exceptions, together with the broad authorization to promulgate appropriate regulations (30 U.S.C. § 902(f)), give the Secretary, and hence the Director, authority to depart from APA standards." *Id.*

sumption in the course of an adjudication is neither a "rule," "order" or a "sanction."

Invocation of the presumption clearly does not qualify as a "rule" as the term is defined in 5 U.S.C. § 551(4). None of the parties have so asserted.

Furthermore, invocation of the presumption does not constitute an "order" as the term is defined in 5 U.S.C. § 551(6). That section provides:

> " 'Order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;"

In *ITT Corp. v. Local 134, IBEW*, 419 U.S. 428 (1975), this Court held that the statutory definition of "order" as "the whole or part of a final disposition . . . of an agency . . ." means that the disposition must have "some determinate consequences for the party to the proceeding." 419 U.S. at 443. In *ITT Corp.*, an employer filed an unfair labor practice charge against a union under Section 8(b)(4)(D) of the National Labor Relations Act. Pursuant to Section 10(k) of the Act a hearing was held before an agent of the National Labor Relations Board to hear and determine the dispute out of which the unfair labor practice arose. The Board rendered a decision adverse to the union which then indicated it would not comply therewith. A Complaint was thereafter issued on the unfair labor practice charge and a hearing before a trial examiner resulted in a cease and desist order against the union. The union appealed the order partially on the basis that it had not been afforded the protections under the APA at the Section 10(k) hearing.

In holding that the APA did not apply to the Section 10(k) proceeding, this Court noted that, "The Board does not order anybody to do anything at the conclusion of a § 10(k) proceeding . . . . 'the § 10(k) decision standing alone binds no one'. We conclude, therefore, that the § 10(k) determination is not itself a 'final dis-

position' within the meaning of 'order.' . . ." 419 U.S. at 443-444.

The union in *ITT Corp.* further argued, however, that if the Section 10(k) decision was not a "final disposition," it was at least "part of a final disposition" within the meaning of 5 U.S.C. § 551(6). In rejecting the argument this Court responded that:

> "While one might argue that an intermediate proceeding within an agency is necessarily a 'part' of a 'final order,' we think a sounder interpretation of the language Congress used is that the phrase 'a whole or a part' refers to components of that which is itself the final disposition required by the definition of 'order' in § 551(6)."

419 U.S. at 443.

In the context of the Black Lung Act, it is the decision of the Administrative Law Judge and not his mere invocation of the presumption which is the "final disposition" having "determinate consequences" for the parties. The invocation of the presumption, far from being a final decision, rather is an "intermediate proceeding" which "standing alone" binds no one. The binding and consequential agency decision cannot be rendered until after the rebuttal phase. Accordingly, the invocation of the presumption cannot be an "order" under the standards of *ITT Corp.*

Consequently, in light of *ITT Corp.*, the Petitioners attempt to pigeonhole the invocation of the presumption into the definition of a "sanction" within the meaning of 5 U.S.C. § 551(10)(E).[20] That section provides:

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[20] The term "sanction" is of dubious applicability here. A favorable black lung decision is an award of benefits to a disabled miner and not a penalty levied against a coal operator. Nonetheless, the Court need not reach this issue since Section 7(c) does not apply to the invocation stage even if an award is a "sanction" under the APA.

> "'sanction' includes the whole or a part of an agency—
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> • • •
>
> (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;"

It follows from the discussion *supra* with respect to the definition of "order" that the invocation of the presumption does not itself constitute an agency's assessment of compensation. Again, the mere invocation of the presumption, standing alone, "binds no one." *ITT Corp.*, 419 U.S. at 444.

Similarly, the Petitioners' attempts to argue that the invocation of the presumption is a "part of" the assessment are unavailing. To be consistent with *ITT Corp.*, the phrase "whole or a part" in Section 551(10) must refer to "components of that which is itself" the assessment of compensation. The invocation of the presumption, therefore, does not meet the definition of a "sanction" under the statute. The invocation is only an intermediate step in a *possible* assessment of compensation.

What is clear from the above is that Section 7(c), by its terms, applies, if at all, only when the final disposition is made, or the compensation assessed, and not earlier. All Section 7(c) requires is that the trier of fact weigh all evidence at the close of a hearing and render a final decision or assessment only upon a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91 (1981).

Sensing the weakness of their "part of" argument, Petitioners assert that in many cases the presumption is so difficult to rebut that invocation of the presumption is the functional equivalent of a "final disposition," and that therefore the APA should apply. This argument fails for several reasons. First, as shown above, it does not square with the interpretations of "order" and "sanction" mandated by *ITT Corp.* Secondly, as shown elsewhere, there are a number of ways that operators can and do challenge the invocation of the presumption.

Thirdly, Section 727.203 as interpreted by the Fourth Circuit provides a coal mine operator with abundant opportunity to submit rebuttal evidence and under the "all relevant medical evidence" provision of subsection (b), the ALJ is commanded to consider it. Hence, the protections of Section 7(c) are fully afforded black lung respondents.[21] Finally, the APA is a statute of general application and its provisions should not be effectively rewritten merely because an operator has difficulty in proving its case in a particular claim.

CONCLUSION

Based upon all of the foregoing, the judgment of the Fourth Circuit holding that under 20 C.F.R. § 727.203 (a) a black lung claimant may invoke the presumption upon a showing of ten years of coal mine employment and the production of a single item of qualifying evidence should be affirmed.

Respectfully submitted,

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[21] The Federal Respondent acknowledges that the Fourth Circuit's interpretation of the interim presumption is entirely consistent with Section 7(c) of the APA. Brief of Federal Respondent, p. 35, n.32.